Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1605

RICHARD NIXON,
Appellant,

v.

ADMINISTRATOR OF GENERAL SERVICES,
THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS, *et al.*,
JACK ANDERSON,
LILLIAN HELLMAN, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM OF APPELLEES THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN HISTORICAL ASSOCIATION, AMERICAN POLITICAL SCIENCE ASSOCIATION, *et al.*,

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Dated: June, 1976

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Pursuant to Rule 16 of the Rules of this Court, appellees The Reporters Committee for Freedom of the Press, American Historical Association, American Political Science Association, *et al.*[1] hereby move that the

[1]The Reporters Committee for Freedom of the Press is an organization devoted to promoting the First Amendment and freedom of information interests of the working press in all media. The American Historical Association is composed of approximately 18,000 scholars engaged primarily in the study, teaching and

[Footnote continued]

judgment and order of the district court be affirmed. The grounds for this motion are (a) that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument and (b) that further briefing and argument will substantially delay implementation of the important objectives that were recognized by Congress and the President in enacting the statute which is the subject of the appeal.[2]

QUESTIONS PRESENTED

The question in this case is whether the records of the conduct of the nation's highest executive office over 5-1/2 crucial years in the nation's recent history may be preserved and regulated by publicly accountable officials in accordance with publicly established rules, or whether these records must, despite efforts of Congress and the incumbent President, be turned over to the ex-President, a private person with no public accountability, whose

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writing of history. The American Political Science Association, which has approximately 17,000 members, is the principal professional organization in the United States devoted to research and education in the art and science of politics and government.

In addition to the organizations described above, the appellees represented in this motion to affirm include the following scholars and journalists: James MacGregor Burns (Professor of Political Science at Williams College and President of the American Political Science Association); Nat Hentoff (author and columnist); Donald Herzberg (Professor of Government and Dean of the Graduate School at Georgetown University); William Leuchtenberg (Professor of American History at Columbia University); Arthur Link (Professor of American History at Princeton University); J. Anthony Lukas (author and reporter); Austin Ranney (Professor of Political Science at the University of Wisconsin); and Clement Vose (Professor of Government at Wesleyan University).

[2]The opinion below has recently been reported at 408 F. Supp. 321.

sole discretion would control decisions as to their preservation, disclosure, nondisclosure or destruction. More particularly, the questions presented are:

1. Whether the doctrine of "executive privilege" or "separation of powers" subordinates the needs of the current administration, Congress, the courts and the public in the records of the Presidency to the desire of a *former* President to exercise sole custody and control over millions of materials that were produced or received by him and his staff in the course of discharging their public responsibilities.

2. Whether the fact that some of an ex-President's personal records are intermingled with a vastly greater quantity of records bearing on the performance of public duties and the exercise of governmental powers entitles that ex-President to exclusive personal custody and control over all such records, notwithstanding the fact that the Presidential Recordings and Materials Preservation Act guarantees that any intermingled materials relating to the ex-President's personal affairs will be returned to him as promptly as possible and will not be made public.

3. Whether the Presidential Recordings and Materials Preservation Act constitutes a bill of attainder or denies appellant equal protection of the laws.

STATEMENT

A. THE MATERIALS AT ISSUE

The materials covered by the Presidential Recordings and Materials Preservation Act (hereinafter "Presidential Materials Act") are, in large measure, the records of the conduct of the executive branch of the Government of the United States from January 20, 1969 to August 9,

1974. They consist of materials that were prepared or received by public servants, on government time, with government facilities, in the course of discharging their governmental duties and/or exercising the powers of the Presidency. They relate to the entire range of issues faced by our Government in recent years, including such matters as the world-wide energy crisis, fundamental shifts in our policy towards China, wage-price controls, inflation, crises and conflicts in the Mideast and Southeast Asia, environmental standards, antitrust policy, housing, education and a multitude of other important matters.

The record below establishes that the presidential materials consist of approximately 42 million documents and 888 5-inch reels of tape-recorded conversations. Of the 42 million documents, appellant admits that he actually saw no more than 200,000.[3]

Many of the materials covered by the Act are of critical importance to the ongoing affairs of the Government. The record below amply establishes the obvious fact that government is a continuing process that does not begin afresh whenever a President departs from office. Various records from appellant's Presidency are currently needed, and will in the future be needed, by the

[3]The Jurisdictional Statement seeks to convey the impression that the dispute in this litigation relates only to this relatively small percentage of the materials, which, it is claimed, are readily identifiable and segregated from the other 41.8 million documents. In fact, however, appellant's pleadings, briefs and arguments in the court below consistently claimed that he is entitled to sole custody of all 42 million records. Moreover, appellant filed a personal affidavit and numerous briefs in the district court in which he asserted that privileged documents and personal, private communications are intermingled throughout the corpus of the presidential materials that are covered by the Presidential Materials Act.

Ford Administration, by Congress, by parties in litigation before the courts, and by the public in general.[4]

For example, the Justice Department has disclosed that "the National Security Council has a group of files which they are constantly using, which are part of the White House papers, so called." The record establishes that the following NSC materials, among others, are among the documents that appellant seeks to acquire in this litigation.

> —Memoranda of conversations between the President and foreign Heads of Government/State and other foreign dignitaries.
>
> —Defense-related papers associated with deployment of forces, budget, research and development, and organization/command structure.
>
> —Telegrams originating in the White House dispatched to foreign governments, U.S. ambassadors, and force commanders relating to foreign policy and national security decisions.
>
> —Sensitive incoming cable traffic associated with negotiations, plans, evaluations, and the impact of decisions taken on national security.[5]

In addition to the needs of the executive branch, many of the presidential materials that appellant seeks relate to

[4]*See generally* the opinion of the court below, Appendix to Jurisdictional Statement at 52a-61a, 408 F. Supp. at 349-54. For brevity, the parallel citations herein will be cited as "App.__, F.S.__." The Jurisdictional Statement will be cited as "J.S. __."

[5]Among other instances of current government need, the record below establishes that General Scowcroft entered the vault containing Nixon administration materials on April 4, 1975 in order to secure the Nixon-Thieu correspondence. This entry coincided with questioning from Congress and elsewhere as to whether appellant as President had made secret commitments to use American force to enforce the 1973 Paris accords on Vietnam.

matters of current congressional concern. For example, in recent months the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities obtained access to and utilized documents from the Nixon administration in its comprehensive review of the nation's intelligence programs.[6] The record below catalogues numerous additional congressional requests that have been opposed by appellant subsequent to his departure from public office.

In a nation where government operates under the rule of law, records of the executive branch are also inevitably needed in a wide variety of judicial proceedings. The record establishes that subpoenas for Nixon administration materials have been served in a number of cases and that appellant has regularly resisted production. The judicial proceedings have, of course, included the investigation and prosecution of the Watergate matters, and in November 1974, the Ford administration entered into an agreement with the Special Prosecutor, prescribing procedures for direct access by members of the Prosecutor's

[6]When the Senate committee sought access to these materials, the Ford administration indicated that it intended to make them available. Appellant fought both the committee and the White House until it became clear that litigation would ensue in which the incumbent President would not support the former President's resistance.

In contrast to the relative success of the Senate Intelligence Committee, the President's Commission on CIA activities within the United States was completely unable to gain access to presidential materials relevant to its mandate. Because of the Rockefeller Commission's short life, it could not undertake litigation to challenge Mr. Nixon's opposition to access by others to the records of his Administration. See *Report to the President by the Commission on CIA Activities within the United States*, 172 n.1 (1975).

staff to certain of the presidential materials. This arrangement was premised on the "personal determination" by President Gerald R. Ford that "the due administration of justice and the public interest require that the Special Prosecutor have prompt and effective use of" the presidential materials.[7]

Finally, the records of appellant's Administration are essential to an understanding by the nation at large of matters of deep public concern. When appellant resigned from the Presidency, mooting the pending impeachment proceedings, the nation's opportunity for a full exposure of the offenses alleged by the House Judiciary Committee was temporarily aborted. The pardon of Mr. Nixon in September 1974 for all crimes committed while in office made it unlikely that there would be a full airing of the facts in judicial proceedings, and the Nixon-Sampson agreement raised the spectre that the record would be permanently suppressed or destroyed. Congress' judgment was that this situation posed a threat to the nation's political health and that the Act was necessary to correct any flaws in our institutions and, not least, to restore public confidence in our Government.

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[7]For another example of the many situations in which the just disposition of judicial proceedings requires access to the presidential materials, *see Sun Oil Co. v. United States*, 514 F.2d 1020 (Ct. Cl. 1975).

In *United States v. National Broadcasting Co.*, 1974-2 Trade Cas. ¶75,396 (D.C. Cal. 1974), which was instituted by the Nixon administration, the Government alleged Sherman Act violations by the major television networks. After Mr. Nixon left office, the action was dismissed because of the Justice Department's inability to comply with a discovery order regarding documents included in the presidential materials of the Nixon administration. After the dismissal, the district court permitted the Ford administration to reinstitute the action on independent grounds.

B. BACKGROUND OF THE ACT

The Presidential Materials Act is not the first, but only the most recent, legislation dealing with preservation of the papers of the executive branch of the Government. The Federal Records Act of 1950, 44 U.S.C. §§2701-3107, and the Presidential Libraries Acts of 1950 and 1955, 44 U.S.C. §2101 *et seq.*, established procedures to preserve government records and to receive additional private materials pertaining to the President and other federal officials. More recently, the Freedom of Information Act, 5 U.S.C. §552, was enacted in an effort to insure that the recorded actions of Executive agencies would be open to public scrutiny.[8]

In 1973, the Watergate hearings and the controversy over personal income tax deductions for "donations" of governmental materials focused public attention on the records of public officials, and it became clear that existing laws were not resulting in effective government retention and control. In late 1973 and early 1974 a number of bills were introduced in an effort to remedy this problem.[9]

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[8]The record below does not support Mr. Nixon's assertion (*see* J.S. at 12) that an "unvarying tradition" establishes his right to dispose of the presidential materials "as he pleases." *See, e.g.*, App. 53a n.40, 70a n.53, F.S. 350 n.40, 358 n.53. See also p. 23 n. 18, *infra*, and the Joint Memorandum of Intervenor-Defendants in the court below, at pp. 51-54 and App. I. Moreover, even if such a "tradition" existed, Congress and President Ford were clearly not required to tolerate an unwise practice in perpetuity, especially in light of dramatic changes in the size and role of the executive branch in the conduct of the U.S. Government.

[9]*See, e.g.*, H.R. 12116, 93d Cong., providing that all papers "produced or acquired" by any federal officer or employee in conjunction with his official duties shall be U.S. property; S. 2951, 93d Cong., providing that all materials relating to public business shall, with minor exceptions, be treated as public documents and deposited in the Archives.

On August 9, 1974, appellant resigned from the Presidency. Within hours, White House archivists were summoned to an emergency meeting and, working virtually around the clock, they began to collect and box, for immediate shipment to California, the documents and papers of appellant's administration. The archivists were "under great pressure to get the materials collected as rapidly as possible."

Shipment of the materials to California was temporarily delayed when the Special Prosecutor asserted that some of the documents and tapes might be needed in connection with his investigations of the various Watergate matters. However, on September 8, 1974, contemporaneously with the announcement of the pardon of the former President, the White House disclosed the terms of an agreement that had been entered into between appellant and the Administrator of General Services, Arthur Sampson. In pertinent part, the Nixon-Sampson agreement provided that:

- —All materials compiled during appellant's administration were to be transferred immediately to California, to be transported and maintained there at taxpayer expense;
- —Mr. Nixon was to "retain" all legal and equitable title to the materials;
- —Ultimate control over access to all materials would rest in the hands of Mr. Nixon alone;
- —After three years, Mr. Nixon could withdraw all the materials (except the tapes) for "any purpose" (including destruction);
- —After five years, Mr. Nixon could order the destruction of whatever tapes he wished, and, in any event, all the tapes would be destroyed by

September 1, 1984, or upon appellant's death, whichever event should first occur.[10]

Announcement of this agreement caused an immediate flood of protest and concern from the Special Prosecutor, from Congress and from the public. Several lawsuits were filed; legislation was introduced; and on December 9, 1974, the Presidential Recordings and Materials Preservation Act was approved by a near-unanimous vote of both the Senate and the House of Representatives. The Act was signed into law by President Ford on December 19. Appellant filed this lawsuit the next day.

C. PROVISIONS OF THE ACT

The Presidential Materials Act provides for the General Services Administration ("GSA") to collect the documents and tapes of the Nixon Administration (§101) and prohibits their destruction (§102(a)). The Act gives Mr. Nixon and his designees full access to the materials at all times (§102(c)) and provides for like access by the Special Prosecutor (§102(b)) and by government agencies "for lawful Government use" (§102(d)). It further provides that GSA shall promulgate regulations respecting general public access that will make certain materials available to the public (§104).

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[10]The agreement had been drafted in great haste. On September 3, 1974, appellant's attorney was advised of the impending pardon and was told that the White House wished to be relieved of responsibility for the tapes and papers. On September 5, Mr. Nixon's attorney presented a draft of an agreement that would, with minor changes, become the Nixon-Sampson agreement. Mr. Sampson was summoned to a meeting on the evening of September 7; he read the agreement then for the first time; and he signed it, without modification, twenty minutes later. The pardon was announced the next morning.

The public access regulations are required to take into account the need to inform the public of the truth about "the abuses of governmental power . . . identified [as] Watergate" (§104(a)(1)); the need to make the materials available for use in judicial proceedings (§104(a)(2)); the need to prevent general access to national security information (§104(a)(3)); the need to protect every individual's right to a fair trial (§104(a)(4)); the need to protect the right of any party to "assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access" to the materials (§104(a)(5)); the need to provide public access to materials of general historical significance (§104 (a)(6)); and the need to provide plaintiff or his heirs "for his sole custody and use" those materials which are not likely to be related to "Watergate" and are not otherwise of general historical significance (§104(a)(7)).

Section 105(c) of the Act provides that if a court determines that the statute has deprived any person of private property without just compensation, the person shall be paid such amount as may be adjudged just by the court.

After making immediate provision for the preservation of the Nixon administration materials, Title II of the Act establishes a commission to study and report to Congress on the manner in which the records of federal officials, including future administrations, should be controlled and preserved, with a view toward future legislation. 44 U.S.C. §§3316-17.

Contrary to the characterization of the statute in the Jurisdictional Statement, *the Presidential Materials Act does not retain Mr. Nixon's private papers.* The statute makes it clear that the Act seeks to regulate only those materials that were prepared or received by public

servants in the course of discharging their governmental responsibilities. The Act applies only to "Presidential historical materials"—*i.e.*, those pertaining to the Presidency. Moreover, the statute expressly provides that all materials that are neither related to the Watergate matters nor otherwise of general historical significance will be given to appellant "for his sole custody and use" (§104(a)(7)), and it recognizes the right of any person "to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access" to the materials (§104(a)(5)). *See also* §104(c).

The legislative history and the proposed regulations leave no doubt but that private and personal papers will not be retained by the Government.[11] The regulations define the "private or personal materials" that will be given to appellant as all:

> "papers and other documentary or commemorative materials in any physical form relating solely to a person's family or other nonpublic activities, including private political association, and having no connection with his constitutional or statutory duties or political activities as President or as a member of the President's staff."

Indeed, all of the appellees, including the Government, have stated repeatedly in this litigation that the statute does not cover Mr. Nixon's private, nonpresidential papers. Appellant is attempting to extend the reach of the Act in a manner contrary to his interests simply

[11] *See, e.g.*, H. R. Rep. No. 93-1507, 93d Cong., 2d Sess. (1974) at 5, 7; 120 Cong. Rec. S. 18236 (daily ed. Oct. 3, 1974) (remarks of Senator Nelson); 120 Cong. Rec. H. 11209 (daily ed. Dec. 3, 1974) (remarks of Representative Brademas); GSA Proposed Regulations §§105-63.104(a), (b), 105-63.401-5 (April 13, 1976).

because he believes that such an extension would create constitutional impediments to the statute as a whole.

D. THE DECISION OF THE THREE-JUDGE COURT

In this three-judge court action, appellant challenged the constitutionality of the Act on its face, not as applied. The court below (Judges McGowan, Tamm and Aubrey Robinson) limited its decision to the issues that are ripe for adjudication prior to the promulgation of regulations governing public availability. App. 18a-31a, F.S. 334-40. Since the public's rights of access will depend on GSA regulations that are not yet in effect, the court postponed for later consideration Mr. Nixon's claim that public disclosure would impinge on various of his constitutional rights.

The court unanimously held that preservation by the Government of the presidential materials of former Executives does not impinge on the powers or privileges of the Presidency. App. 31a-66a, F.S. 340-57. Rejecting appellant's abstract separation-of-powers argument, the court ruled that appellant's claim must be resolved by a pragmatic consideration of the extent to which the act of one branch of the Government prevents another from performing its assigned duties. App. 34a-35a, F.S. 342. Since President Ford signed the Presidential Materials Act into law and his administration has actively defended it against appellant's private challenge, the court found "much to commend" the position that the theoretical impairment of executive powers perceived by appellant (but not recognized by the current President) "could not be the basis for invalidating the act." App. 37a, F.S. 343. However, the court found it unnecessary to dispose of the case on that ground for "even assuming *arguendo* that Mr. Nixon may, as a former President, assert executive

privilege, such a claim is not as forceful as one raised by an incumbent." App. 40a, F.S. 344.

The district court noted that appellant while in office could have seen no more than a fraction of one percent of the millions of documents which he claims in this litigation. App. 40a, F.S. 345. Moreover, the court recognized that even with respect to the small percentage that might arguably be privileged, a number of considerations erode the confidentiality of presidential materials after a former President has left office. App. 42a, F.S. 346. First, the record disclosed that former Presidents and their advisers usually publish memoirs and that appellant himself had established a tape recording system to aid him in doing so. App. 42a-43a, F.S. 346. Second, every former President in recent years has deposited the materials of his administration in a presidential library for preservation and eventual disclosure, an example that appellant claimed he intended to follow. App. 43a-45a, F.S. 346-47. Third, even assuming that some of the presidential materials should be withheld from disclosure, past Presidents have uniformly adopted the practice that would be employed under the Act of employing government archivists—"whose record for discretion in handling confidential material is unblemished"—for the purpose of reviewing and classifying presidential papers. App. 45a, F.S. 347.[12]

Furthermore, the court below held that important public interests outweighed any interest that appellant might have in controlling all of the records of his

[12]The record below demonstrates that appellant himself would have used these archivists even if the Presidential Materials Act had not been enacted. The district court recognized that that review of the millions of presidential materials "requires both enormous expertise and enormous manpower." App. 46a, F.S. 347.

administration. App. 48a-66a, F.S. 348-57. The court concluded that preservation for history, so that the nation can understand its past, "could hardly be more integral to a society based on democratic principles and devoted to freedom of expression. . . ." App. 51a-52a, F.S. 350. Moreover, "[g]overnmental programs and policies do not expire every four or eight years" (App. 52a-53a, F.S. 350); and the court took note of the extensive record evidence of the ongoing needs of the executive, legislative and judicial branches for access to materials of the Nixon administration. App. 52a-61a, F.S. 350-54. The court further observed that Congress had an adequate basis for concluding that former Presidents, including especially appellant, might not screen the records in a disinterested manner, and that government archivists would better protect the public interests in the materials. App. 46a-48a, F.S. 347-48.

The district court also rejected the claim that review of presidential materials by government archivists would violate any of appellant's constitutionally protected rights of privacy or free speech and association. App. 67a-93a, F.S. 357-69. The court found that appellant saw no more than 200,000 of the 42 million documents and that not more than a tiny fraction of these relate to personal and private matters, as distinguished from government affairs. App. 69a, F.S. 358. Given the fact that private and governmental materials were intermingled by appellant's administration in a manner that makes it "impossible to segregate [them] other than by reviewing all of them" (App. 79a, F.S. 362), the court determined that screening by professional, discreet archivists is not only "a reasonable response to the difficult problem caused by the mingling of personal and private documents and conversations in the midst of a vastly

greater number of nonprivate documents," but is also "the least intrusive manner" of protecting government interests of overriding importance. App. 87a-88a, F.S. 367. With respect to appellant's claim that the Act would impinge on his First Amendment right of associational privacy, the district court pointed out that the statute guarantees the return to appellant of all such private materials after they have been screened, on a confidential basis, by archivists. App. 89a-93a, F.S. 367-69.[13]

Finally, the district court rejected appellant's argument that the Presidential Materials Act denies him equal protection of the laws and constitutes a bill of attainder. The court noted, *inter alia,* that appellant is the only former President whose papers have not been deposited in a presidential library (App. 93a-94a, F.S. 370); that Title II of the Act establishes a commission to study and propose legislation concerning the papers of all federal officials (App. 94a, F.S. 370); that Congress had an adequate basis for concluding that the Government, rather than appellant, was the better custodian for the materials (App. 95a-96a, F.S. 370-71); and that appellant's characterization of the statute as punitive "falls far short of making out a meritorious bill of attainder claim." App. 98a, F.S. 372.

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[13]Appellant's claim that virtually everything he did while in office was "political," and therefore protected by the First Amendment, was rejected by the court. See pp. 23-25, *infra.*

ARGUMENT

A.

THE QUESTIONS RAISED BY APPELLANT CONCERNING THE CORRECTNESS OF THE LOWER COURT'S DECISION ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

The unanimous opinion of the lower court, consuming over 100 pages, analyzes the facts and law with extreme care and thoroughness. It carefully points out, in a 12-page preliminary discussion, that the legal question presented is a narrow one. Only by resorting to broad abstractions, well removed from the concrete facts of this case, can appellant's Jurisdictional Statement assert that this case involves "issues of constitutional principle . . . fundamental to our system of government." The Jurisdictional Statement merely repeats a miscellany of arguments that were presented to, and decisively laid to rest by, the lower court. We briefly discuss them here to show that, however historic may be the *facts* that gave rise to this case, the *legal* questions in this appeal are unsubstantial.

1. The Act Does Not Violate the "Separation of Powers" Doctrine or Intrude on "Presidential Privilege."

The short answer to appellant's contention that the Act trenches on executive prerogative is that the executive branch itself has defended the Act in this case. There is simply no dispute between the legislative and executive branches concerning the constitutionality of the statute. The incumbent President signed the Presidential Materials Act into law; the incumbent President has operated under the Act for seventeen months without expressing any concern that it is hampering the free flow of candid

advice; and the incumbent President authorized the Department of Justice to defend the Act before this Court.

Under the rule of *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953), the fact that the executive branch has not only refused to endorse appellant's "separation of powers" and "executive privilege" claims, but is actively opposing them as well, precludes him from advancing such contentions as a private citizen.[14] To hold otherwise would be to allow a former President, who is no longer publicly accountable, to frustrate his successor by withholding documents essential to the continuity of government. In any event, assuming *arguendo*, as the district court did, that Mr. Nixon has some remaining right to assert presidential privilege (*see* App. 40a, F.S. 344-45), the fact that the incumbent President opposes such claims must be viewed as compelling evidence of the invalidity of Mr. Nixon's contention that the Act is undermining the Presidency.[15]

Moreover, the record, findings and conclusion of the district court establish that far from impairing the ability of the President to discharge his duties effectively, the Act will enhance the Presidency by promoting a more orderly transition between those who hold that impor-

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[14]The assertion in the Jurisdictional Statement that the court below "repudiated" the holdings of *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and *O'Donoghue v. United States*, 289 U.S. 516 (1933), is plainly incorrect. The court simply held that the language lifted by appellant from those cases was not controlling where a *former* President is asserting claims which both the incumbent Executive and Congress oppose.

[15]The district court explicitly recognized that the *incumbent* President could assert presidential privilege in appropriate circumstances. App. 37a n.26, F.S. 343 n.26.

tant office (App. 52a-57a, F.S. 350-52); that presidential materials from former administrations have ongoing importance for the functioning of the legislative and judicial, as well as the executive, branches of government (App. 59a-61a, F.S. 353-54); and that preservation for history and the healthy functioning of the political process is a valid, and fundamental, legislative goal (App. 49a-52a, F.S. 349-50).

Appellant challenges the legitimacy of these objectives by speculating that "[t]he practical effect" of the Act is to "make uncertain the confidential status of communications of current employees of the Executive and Judicial Branches." (J.S. at 19.) This overlooks several facts. First, appellant's argument relates to the issue of public disclosure, which was deferred by the court below. Second, the Ford administration, whose communications would be "chilled" if appellant's speculation were correct, has supported and defended the Presidential Materials Act.[16] Third, the circumstances surrounding appel-

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[16]It is neither necessary nor appropriate for this Court to decide the constitutionality of the hypothetical "Judicial Materials Preservation Act" that appellant postulates in his Jurisdictional Statement. For present purposes it is sufficient to note that such legislation would pose substantially different considerations than those involved here. There is no parallel between the 42 million documents generated by the hundreds of members of the institutionalized Presidency and the far smaller number of documents generated by this Court and its staff. Moreover, this Court has an entirely different function than the President in our constitutional system. The Court is intended to be insulated from public and political pressures and is confined in its power to rendering public decisions upon public records in particular cases. The legitimacy of the Court's action derives from the reasoning of its published opinions. The President, on the other hand, is an elected representative and is responsible for the general administration of thousands of statutes and programs through a vast bureaucracy. He

[Footnote continued]

lant's abrupt departure from office amid impending impeachment proceedings, together with the Nixon-Sampson agreement which explicitly required the destruction of some of the presidential materials, called for unique and urgent congressional action if public confidence in government was to be restored. Fourth, to the extent that public availability of the presidential materials is properly at issue at the present time, the question should be decided on the basis of facts in the record, and not by appellant's self-serving conjecture. The record below firmly establishes, and the district court found, that a staff member's expectation of confidentiality rapidly erodes after a President leaves office. See p. 14, *supra*.

This Court has previously rejected blanket claims of executive privilege when Mr. Nixon asserted them as an incumbent President. *United States v. Nixon*, 418 U.S. 683 (1974). Surely such overreaching claims warrant even less consideration in this case where the official representatives of the incumbent President oppose them as invalid, where appellant concedes that he never created nor saw more than a small fraction of the 42 million documents that he claims in this litigation, where appellant advances his claims as a private citizen, and where the materials relate to the administration of an official who resigned his office in mid-term on the eve of formal impeachment resolutions for alleged wrongdoing while in office.

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formulates policies and makes decisions with profound consequences without rendering a formal public judgment. His legitimacy derives from the regularity and fidelity with which he executes the laws—as evidenced in the records generated by his conduct of the office. He is accountable to the public and could go far to frustrate such accountability if he could control and destroy at will the records of his office.

Again, assuming *arguendo* that Mr. Nixon has some vestigial right to assert claims of privilege, it is clear that the district court applied the proper legal standard. Any intrusion on executive privilege resulting from the classification of the materials by professional archivists working under strict standards of confidentiality (just as other professional archivists have classified the papers of all other recent Presidents) is far outweighed by the important government and public interests in the preservation of the materials. Mr. Nixon's present contentions and speculation to the contrary do not warrant further plenary review.

2. The Act Does Not Violate Mr. Nixon's Right of Privacy.

Appellant's privacy argument rests on decisions of this Court involving intimately private acts such as procreation. But as the Court has recently held, these cases cannot be taken as standing for a broad right of privacy extending to other, far more public contexts. *Paul v. Davis*, 96 S. Ct. 1155, 1167 (1976). The Court has never suggested that the Fourth or Ninth Amendments to the Constitution permit a public official to shroud his conduct in public office from public scrutiny.[17] Rather, the Court has held on a number of occasions that the actions of a public servant should generally be open to

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[17]Appellant's effort to characterize *United States v. Nixon* as establishing such a right (see J.S. at 23) is clearly mistaken. That case dealt solely with the issues of executive privilege and separation of powers, and the Court did not hold or imply that a public official has a *personal* right of confidentiality over and above such protection as might flow from the doctrine of executive privilege and separation of powers. Moreover, in *Nixon*, the Court was considering a claim by an *incumbent* President based upon the confidentiality surrounding the active conduct of his office.

the public, which is "the final judge of the proper conduct of public business." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975). *See also, New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The district court did not overlook the fact that some of appellant's truly personal papers may be intermingled among the presidential materials. However, the court recognized that the preservation and publication provisions of the Presidential Materials Act do *not* apply to such documents and that the Act mandates their return to Mr. Nixon as soon as they have been segregated from the vast majority of the records which relate to Mr. Nixon's actions as President. The district court properly focused on whether the mere act of segregating these personal papers from the government documents will violate Mr. Nixon's right of privacy. App. 79a-80a, F.S. 362-63.

The record establishes that the segregation process will be conducted by professional archivists with an unblemished record for discretion (App. 45a and 83a, F.S. 347 and 365), pursuant to a statute and regulations which fully protect the privacy rights of Mr. Nixon and all other individuals. Moreover, the Act and proposed regulations provide for judicial review of any archival decision to retain or publicize any of the materials. These procedures provide ample protection for any legitimate privacy interests that appellant might have.

The issue is a simple one: Given the fact that more than 99.9 percent of the materials relate to governmental matters, does the Constitution prohibit the Government from reviewing the records on a confidential basis for the purpose of segregating the tiny fraction of personal documents for return to Mr. Nixon? Or, conversely, does the fact that appellant mingled his personal records in the

governmental files bootstrap him into a position where he can claim a constitutionally protected personal right of privacy in—and control over—millions of records relating to the Presidency? The district court's resolution of this issue was plainly correct, and there is no need for further briefing and argument before this Court.

3. The Act Does Not Violate Mr. Nixon's Rights of Free Speech and Association.

Appellant contends that most of what he did while in office was "political" in nature and, therefore, that the documentary record of his Presidency is protected from government retention under the rationale of decisions that recognize the right of private citizens to engage in private political activity. This position is patently untenable.

The term "political" has a variety of meanings. It is one thing to hold that the Constitution permits a private individual to express his personal political preferences—*e.g.*, to join the NAACP—free from prying by the Government (*see NAACP v. Alabama*, 357 U.S. 449 (1958)); it would be totally different to conclude, as appellant suggests, that the First Amendment permits elected officials to exercise—and abuse—the powers and duties of their positions in secret because these duties entail use of "political" leadership.

According to appellant's theory, a document is "political," and hence his personal property, if it is related to "public leadership" or "the marshalling of public and political support for the President's policies . . . ." (J.S. at 26.)[18] Thus, a memorandum from a staff assistant to a

[18]Appellant's expansive definition of the term "political" is taken from the congressional testimony of Professor Herman Kahn.

[Footnote continued]

member of the National Security Council concerning the deployment of strategic weapons would be protected by Mr. Nixon's First Amendment rights if it contained any suggestion that the President's decision on the issue should include a consideration of possible "political" reaction by the American people or possible need for "political" leadership by the President to secure public or congressional support for the move.

Appellant's effort to invoke the confidentiality of private political association also leads him to claim First Amendment protection for documents that are "political" only because they reveal an abuse of government power for political purposes. For example, Mr. Nixon asserted in his deposition in this action that a memorandum from John Dean (counsel to the President) to Egil Krogh (Deputy Assistant for Domestic Affairs) suggesting action to restrict government contracts awarded to the Brookings Institution was a "political" document rather than a governmental one.[19]

Appellant's Jurisdictional Statement neglects to point out, however, that Professor Kahn also stated, in the same testimony, that:

> "Since President Roosevelt's time, it has become part of our unwritten Constitution that a President cannot do other than to immediately leave all his White House papers to the Government when he leaves the White House. All of them, immediately upon departing the White House, have made their papers the property of the Federal Government." *Statement Before the Printing Subcommittee of the House Committee on Administration on H.R. 16902* at 6 (October 4, 1974).

[19]Appellant's present position is in sharp contrast to the posture he adopted in *United States v. Nixon, supra*, in which he characterized the great bulk of his activities while in office as governmental, as opposed to political, in nature. In response to a question by Justice White during oral argument before this Court, counsel for Mr. Nixon distinguished between political conversa-

[Footnote continued]

Extending personal First Amendment protection to the records generated by Presidents in the conduct of their public office would effectively shelter them from public accountability for the use—or misuse—of their publicly conferred powers. Mr. Nixon's totally unprecedented theory would treat a President's public office as a mere attribute of his private personality, from which he is entitled to exclude the public as he might if it probed into his family life, his religious views, or his strictly personal political affiliations unrelated to the use of public authority. Like other positions Mr. Nixon has taken, this theory assumes that the President is somehow the source of sovereign powers, rather than merely the servant of a sovereign people. This expansive concept of the "political" activities protected by the First Amendment would also entitle other officials and employees of the executive branch to claim that the public is prohibited from prying into the "political" manner in which they discharge their duties. The constitutionality of the Federal Records Act and the Freedom of Information Act would be doubtful at best.

The district court did not overlook the possibility that some strictly private associational materials might have been intermingled by appellant among the presidential materials of his administration. However, as in the case of the other private materials that appellant seeks, the court

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tions and those relating to performance of his duties as President. (Tr. at 84-86.) The following question and answer followed:

> "QUESTION: Would you automatically say that every conversation about Watergate is in the course of the performance of the duties of the President of the United States?
>
> "MR. ST. CLAIR: I would think it would be, yes, sir." (Tr. at 86.)

properly concluded that such records will *not* be retained under the Act and that "any burden arising solely from review by professional and discreet archivists is not significant, and certainly not significant enough to outweigh countervailing government interests." App. 92a, F.S. 369. Such a confidential review is certainly no more intrusive on appellant's associational rights than examination by government officials of the mandatory reports on political contributions established by the Federal Election Campaign Act. *See Buckley v. Valeo*, 96 S. Ct. 612 (1976).

4. The Act Does Not Constitute a Denial of Equal Protection or a Bill of Attainder.

Appellant's contention that the preservation and classification of the materials at issue constitutes a denial of equal protection and a bill of pains and penalties deserves little attention by this Court. The district court properly applied the well-established rule that a legislative enactment does not violate the equal protection clause merely because it "address[es] itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955). *Accord: Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 39 (1973). The court was equally correct in concluding that only the "clearest proof" of punitive legislative intent can justify characterizing a statute as a bill of attainder (*Flemming v. Nestor*, 363 U.S. 602, 617 (1960)), and that, contrary to Mr. Nixon's bald allegations, both the Act and its legislative history clearly demonstrate that Congress' intent was remedial in nature. App. 93a-103a, F.S. 369-74.

B.

FURTHER PLENARY REVIEW WOULD SUBSTANTIALLY DELAY THE IMPLEMENTATION OF THE IMPORTANT OBJECTIVES OF THE ACT.

There is a further reason why this Court should immediately affirm the judgment of the court below. Congress' judgment in enacting the Presidential Materials Act was that there was a need "to provide the public with the full truth, *at the earliest reasonable date*, of the abuses of governmental power [known as] 'Watergate' " (§104(a)(1), emphasis added). The statute directs the General Services Administration to act expeditiously in processing the presidential materials. Moreover, Congress expressed concern about possible litigation delays, and it directed the district court to treat Mr. Nixon's challenge as a matter requiring "immediate consideration and resolution" and to give it priority over other cases (§105(a)).

As of the date of this Motion, 21 months have passed since appellant resigned from office, and the Act has been in effect for 17 months. Processing of the presidential materials cannot even begin until this appeal has been affirmed. Especially in light of the unsubstantial nature of appellant's claims, further delay is neither necessary nor appropriate.

CONCLUSION

For the reasons discussed above, we respectfully submit that the judgment and decree of the district court should be affirmed.

Respectfully submitted,

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